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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. BRIAN LEE WARREN, Appellee.	2 CA-CR 2011-0089 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102900001

Honorable Teresa Godoy, Judge Pro Tempore

REVERSED

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V Á S Q U E Z, Presiding Judge.

¶1 The state appeals from the trial court's grant of appellee Brian Warren's motion to suppress blood test results derived from samples provided to law enforcement pursuant to A.R.S. § 28-1388(E) following a blood draw by medical personnel. The state

argues that the evanescent nature of blood alcohol evidence necessarily creates the exigent circumstances required for police to seize a blood sample drawn by medical personnel. We reverse.

¶2 In reviewing a motion to suppress, we consider only the facts presented at the suppression hearing and view those facts in the light most favorable to upholding the trial court's ruling. *See State v. Box*, 205 Ariz. 492, ¶ 2, 73 P.3d 623, 624 (App. 2003). Warren was involved in a motor vehicle accident in August 2010. The responding police officer, Gary Rosebeck, noted Warren had bloodshot eyes and a strong odor of intoxicants on his breath. Rosebeck also administered a horizontal gaze nystagmus test which showed Warren had six of six impairment cues. Warren denied being the driver of the vehicle, but another passenger claimed Warren had been driving. Believing he lacked probable cause, Roseback did not place Warren under arrest, and Warren was taken to the hospital for treatment. Roseback later learned that a clerk at a nearby convenience store had reported that she had seen Warren driving shortly before the accident. He then directed another officer to go to the hospital to obtain a blood sample. A nurse drew Warren's blood and provided a sample to the officer.

¶3 Warren moved to suppress the results of analysis of that sample, arguing, inter alia, that the blood draw was improper pursuant to § 28-1388(E) because the state lacked probable cause to believe Warren had committed a DUI offense,[1] the blood draw

[1]A DUI offense, as defined by A.R.S. § 28-1381, prohibits driving while under the influence of various substances, with an alcohol concentration of .08 or more, or with a drug defined by A.R.S. § 13-3401 or its metabolite in the driver's body.

was not for medical purposes, and there were no exigent circumstances present. After a hearing, the trial court granted the motion, concluding that although the state had established the requisite probable cause and that the draw was for medical purposes, the state failed to demonstrate there were exigent circumstances justifying the warrantless seizure of Warren's blood sample. After the court denied the state's motion for reconsideration, this appeal followed.

¶4 "In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court with respect to the factual determinations it made but review the court's legal conclusions de novo." *State v. Olm*, 223 Ariz. 429, ¶ 7, 224 P.3d 245, 248 (App. 2010). Section 28-1388(E), in pertinent part, provides:

> Notwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated § 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

Our supreme court determined in *State v. Cocio*, 147 Ariz. 277, 284, 709 P.2d 1336, 1345 (1985), that pursuant to former § 28-692(M),[2] which is substantively identical to § 28-1388(E), the state, in the absence of a warrant, may obtain a portion of blood drawn from a person by medical personnel for medical purposes if there is probable cause to believe the person has committed a DUI offense and exigent circumstances exist.

¶5 On review, the state argues that, due to the evanescent nature of alcohol in a person's bloodstream, exigent circumstances necessarily exist for the purpose of § 28-

[2]1984 Ariz. Sess. Laws, ch. 257, § 2.

1388(E) when there is probable cause to believe a person was driving under the influence of alcohol. We agree. In analyzing the exigency requirement, the court in *Cocio* determined that "exigent circumstances can justify a search based on probable cause when imminent destruction of evidence is likely and the intrusion is minimal." 147 Ariz. at 284, 709 P.2d at 1345. It concluded those circumstances existed when the state had seized blood drawn by medical personnel under former § 28-692(M) because "[t]he highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time" and any intrusion on the defendant's Fourth Amendment rights was minimal because the blood draw was performed for medical purposes and "[n]o additional needle puncture was required, and no additional trauma, pain or interference with the medical treatment of defendant was involved." 147 Ariz. at 284-85, 709 P.2d at 1345-46.

¶6 Arizona courts consistently have interpreted *Cocio* to create a per se rule that, under § 28-1388(E), the evanescent nature of alcohol in blood establishes the required exigency. *See State v. Aleman*, 210 Ariz. 232, ¶ 14, 109 P.3d 571, 576 (App. 2005) (argument § 28-1388(E) inapplicable because officers had ample time to obtain warrant "clearly refut[ed]" by *Cocio*); *Lind v. Superior Court*, 191 Ariz. 233, ¶ 20, 954 P.2d 1058, 1062 (App. 1998) (declining to "revisit the supreme court's holding in *Cocio* that a blood sample presents an exigent circumstance due to the 'highly evanescent nature of alcohol' in a defendant's bloodstream"), *quoting Cocio*, 147 Ariz. at 284, 709 P.2d at 1345; *State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989) (relying on *Cocio* to reject argument no exigency existed because defendant conscious and could

have been arrested and advised of implied consent rights). The trial court, however, determined that the transient nature of such evidence was merely a factor to consider in determining whether an exigency exists. That approach is not consistent with *Cocio* or the cases relying on it.

¶7 The trial court instead primarily relied on *State v. Flannigan*, 194 Ariz. 150, ¶ 21, 978 P.2d 127, 131 (App. 1998), in which Division One of this court determined that the evanescent nature of blood evidence did not alone create an exigency absent evidence that police did not have adequate time to acquire a warrant. But the court in *Flannigan* did not address § 28-1388(E) or its predecessor—instead addressing a warrantless blood draw undertaken by police, not a blood draw taken by medical personnel for medical purposes. 194 Ariz. 150, ¶ 6, 978 P.2d at 128; *see also Aleman*, 210 Ariz. 232, n.5, 109 P.3d at 577 n.5 (distinguishing *Flannigan* in part on that basis). The exigency analysis differs under § 28-1388(E). And the trial court did not recognize that *Cocio*'s determination that an exigency exists when applying that statute was based not only on the evanescent nature of blood alcohol evidence but also on the minimal intrusion on the defendant's Fourth Amendment rights. 147 Ariz. at 284-85, 709 P.2d at 1345-46. The intrusion addressed by the court in *Flannigan* clearly was not minimal; police officers apparently drew the defendant's blood without his consent. 194 Ariz. 150, ¶ 6, 978 P.2d at 128.

¶8 Warren asserts, however, that *Cocio* is distinguishable. He notes that, at the time *Cocio* was decided, the DUI statute, former § 28-692(B), required evidence of the defendant's blood alcohol content at the time of driving and the current statute, in

contrast, prohibits having an alcohol concentration of .08 or more within two hours of driving, § 28-1381(A)(2). But the change in the statute does not render less meaningful the evanescent nature of blood alcohol evidence. Although the two-hour window means the state must prove a defendant's alcohol concentration within a narrower timeframe than under former § 28-692, it does not change the fact that the evidence dissipates rapidly.

¶9 Warren also suggests, as we understand his argument, that *Cocio* is distinguishable because retroactive extrapolation of alcohol concentration test results "to within two hours" of driving is permitted. But Warren cites no authority, and we find none, suggesting such extrapolation was not permitted at the time *Cocio* was decided. Finally, Warren suggests, without citation to authority or evidence, that "it is [now] possible to get a warrant within a reasonable time period." Nothing in the record supports a conclusion the investigating officer could have obtained a warrant in less time than the officer in *Cocio* could have done so. Further, *Cocio* does not address that question or even suggest that it is relevant to the analysis; it simply states that, because the evidence dissipates quickly and the intrusion on the defendant's rights is minimal, an exigency exists. 147 Ariz. at 284-85, 709 P.2d at 1345-46.

¶10 In short, we conclude *Cocio* controls the outcome here, and the trial court therefore erred in finding that no exigency existed sufficient to permit the police officers to seize Warren's blood pursuant to § 28-1388(E). "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them."

City of Phx. v. Leroy's Liquors, Inc., 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

Accordingly, we reverse the trial court's grant of Warren's motion to suppress.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge